CHANDRAN G NAIR & ORS

v.

AFFIN BANK BHD

COURT OF APPEAL, PUTRAJAYA
MOHAMAD ARIFF YUSOF JCA
MAH WENG KWAI JCA
DAVID WONG DAK WAH JCA
[CIVIL APPEAL NO: W-02(NCVC)(W)-1033-05-2013]
20 MAY 2014

LEGAL PROFESSION: *Duty of care - Negligence - Solicitors appointed to commence civil proceedings for recovery of money - Failure to file proof of debt within time permitted - Lapse of time - Claim by client for loss of opportunity to recover monies due and owing - Whether solicitors negligent*

EVIDENCE: *Admissibility - Non-calling of maker of evidence - Recovery of debt - Certificate of indebtedness - Whether sum proven - Maker of certificate of indebtedness not called - Whether maker of certificate either dead or unfit by reason of his bodily or mental condition to attend as witness - Whether certificate sufficient to prove measure of loss - Evidence Act 1950, s. 73A(1)*

The respondent had appointed the appellants as their solicitors to commence civil proceedings against the borrower, Astral Master (M) Sdn Bhd and three guarantors for the recovery of an outstanding sum of RM10,672,079.80 ('the said sum'). The respondent entered into a consent order with one of the guarantors ('Abdul Rashid') and other defendants for the said sum with interests and costs. As the debtors were in default of payment of the sum, the respondent instructed the appellants to commence bankruptcy proceedings against Abdul Rashid and another guarantor. Abdul Rashid challenged the validity of the bankruptcy notice but his application was dismissed by the Senior Assistant Registrar. However, on appeal to the judge in chambers, the decision was reversed as the bankruptcy notice was held to be defective and that it contained the sum of RM669.75 as costs which were not provided for in the amended court order. On 30 July 2007, the respondent instructed the appellants to file an appeal to the Court of Appeal and at the same time to file a fresh bankruptcy notice against Abdul Rashid. The appellant filed the

former but failed to file the latter. Abdul Rashid was later discovered to have been adjudged a bankrupt. Since the consent order was entered on 17 May 1996, the 12 year limitation period to enforce the judgment expired on 17 May 2008. *Vide* another bankruptcy search made on Abdul Rashid on 5 March 2009, it was discovered that Abdul Rashid was no longer a bankrupt and the respondent issued a certificate of indebtedness ('the certificate') stating that Abdul Rashid was indebted in the sum of RM5,520,236.77. In the High Court, the respondent claimed that it had lost the opportunity to recover any monies due and owing from Abdul Rashid due to the negligence of the appellants. In particular, the respondent claimed that the appellants failed to file the proof of debt within the time permitted or at all after Abdul Rashid had been adjudged a bankrupt. The trial judge held the appellants to be 60% liable for negligence while the respondent was said to be 40% liable. The appellants were ordered to pay RM3,312,142.06 being 60% of the sum of RM5,520,236.77 stated in the certificate, together with interests and costs. Dissatisfied, the appellants appealed against the whole decision while the respondent cross-appealed against that part of the order holding them 40% liable for contributory negligence.

Held (allowing appellants' appeal in part; allowing respondent's appeal)

Per Mah Weng Kwai JCA delivering the judgment of the court:

(1) The certificate was wrongly admitted into evidence. There was no evidence to suggest that the maker of the certificate was either dead or unfit by reason of his bodily or mental condition to attend as a witness or was beyond the seas to come within the ambit of the proviso to s. 73A(1) of the Evidence Act 1950. There was no admissible evidence adduced by the respondent to prove the sum of RM3,312,142.06 or any part thereof as damages suffered by the respondent. Even if it was regarded as admissible in evidence, the certificate was insufficient to prove the measure of loss suffered by the respondent. (paras 27, 28 & 33)

(2) Before the certificate could become operable and binding, there must firstly be in existence, a 'conclusive evidence clause' in the agreement between the lender and the borrower. In the present case, there was no such clause. The

respondent could not merely rely on the certificate to hold the appellants liable for the amount stated in the certificate collaterally. It simply was not a term of appointment of the appellants as solicitors that any sum stated in the certificate issued would also become the debt of the solicitors. (para 38)

(3) Aside from the certificate, there was nothing else adduced to show what was in fact owing by Abdul Rashid. There was no evidence to show even if the proof of debt had been filed by the appellants at the material time, that Abdul Rashid would have been in any position to pay the sum of RM5,520,236.77 or any part thereof. It was simply not possible, indeed not correct, for the court to speculate how much of the debt was recoverable from Abdul Rashid. There was nothing to show how much the appellants could have recovered from Abdul Rashid on behalf of the respondent if the appellants were not negligent and had filed the proof of debt accordingly. (para 38)

(4) The respondent must have suffered some amount of loss through the negligence of the appellants as the respondent was wholly unable to recover any sums of money from Abdul Rashid. While the court could not accept the finding of the trial judge that the respondent had lost the sum of RM5,520,236.77 or any lesser sum, the court was only prepared to award the sum of RM50,000 to the respondent as nominal damages, which was neither miniscule nor excessive in the circumstances. (paras 39, 40 & 42)

Bahasa Malaysia *Translation Of Headnotes*

Responden telah melantik perayu-perayu sebagai peguamcara mereka untuk memulakan prosiding sivil terhadap si peminjam, Astral Master (M) Sdn Bhd dan tiga penjamin bagi mendapatkan semula jumlah terhutang sebanyak RM10,672,079.80 ('jumlah tersebut'). Responden telah memasuki perintah persetujuan dengan salah seorang penjamin ('Abdul Rashid') dan defendan-defendan lain bagi jumlah tersebut dengan faedah dan kos. Memandangkan penghutang-penghutang ingkar dalam pembayaran jumlah tersebut, responden telah mengarahkan perayu-perayu untuk memulakan prosiding kebankrapan terhadap Abdul Rashid dan seorang lagi penjamin. Abdul Rashid mencabar kesahan notis kebankrapan tetapi permohonannya ditolak oleh Penolong Kanan Pendaftar.

Walau bagaimanapun, selepas merayu kepada hakim dalam kamar, keputusan tersebut diakas kerana notis kebankrapan diputuskan sebagai cacat dan jumlah sebanyak RM669.75 dinyatakan sebagai kos yang tidak diperuntukkan dalam perintah mahkamah terpinda. Pada 30 Julai 2007, responden mengarahkan perayu-perayu untuk memfailkan rayuan kepada Mahkamah Rayuan dan pada masa yang sama, memfailkan notis kebankrapan yang baru terhadap Abdul Rashid. Perayu memfailkan rayuan tetapi gagal memfailkan notis kebankrapan yang baru. Abdul Rashid kemudiannya didapati telah diputuskan sebagai bankrap. Memandangkan perintah persetujuan telah dimasuki pada 17 Mei 1996, tempoh had masa 12 bulan untuk menguatkuasakan penghakiman luput pada 17 Mei 2008. Melalui satu lagi carian kebankrapan yang telah dibuat ke atas Abdul Rashid pada 5 Mac 2009, adalah didapati bahawa Abdul Rashid bukan lagi seorang bankrap dan responden mengeluarkan sijil keberhutangan ('sijil') menyatakan bahawa Abdul Rashid berhutang sejumlah RM5,520,236.77. Di Mahkamah Tinggi, responden mendakwa bahawa ia kehilangan peluang untuk mendapatkan semula wang yang terhutang daripada Abdul Rashid atas kecuaian perayu-perayu. Khususnya, responden mendakwa bahawa perayu-perayu gagal memfailkan bukti hutang dalam masa yang dibenarkan atau sama sekali selepas Abdul Rashid diputuskan bankrap. Hakim bicara memutuskan bahawa perayu-perayu bertanggungan sebanyak 60% bagi kecuaian manakala responden-responden adalah 40% cuai. Perayu-perayu diperintahkan untuk membayar RM3,312,142.06 iaitu 60% daripada jumlah RM5,520,236.77 yang dinyatakan dalam sijil, bersama-sama dengan faedah dan kos. Tidak berpuas hati, perayu-perayu merayu terhadap keseluruhan keputusan manakala responden merayu balas terhadap bahagian dalam perintah yang memutuskan bahawa mereka bertanggungan sebanyak 40% bagi kecuaian bersama.

Diputuskan (membenarkan sebahagian rayuan perayu-perayu; membenarkan rayuan responden)

Oleh Mah Weng Kwai HMR menyampaikan penghakiman mahkamah:

(1) Sijil tersebut telah disalah terima sebagai keterangan. Tiada keterangan untuk mencadangkan bahawa pembuat sijil tersebut telah meninggal dunia atau tidak sihat atas sebab keadaan badan atau mentalnya untuk hadir sebagai saksi atau berada di luar negara dalam maksud proviso kepada s. 73A(1) Akta Keterangan 1950. Responden tidak mengemukakan keterangan

yang boleh diterima untuk membuktikan jumlah RM3,312,142.06 atau mana-mana bahagian dalamnya sebagai kerugian yang dialami olehnya. Walaupun ia dianggap boleh diterima dalam keterangan, sijil tersebut tidak mencukupi untuk membuktikan jumlah kehilangan yang dialami responden.

(2) Sebelum sijil tersebut boleh beroperasi dan mengikat, mestilah pertamanya wujud 'klausa keterangan konklusif' dalam perjanjian antara pemberi pinjaman dan peminjam. Dalam kes ini, tidak terdapat klausa sedemikian. Responden tidak boleh sekadar bersandarkan pada sijil tersebut untuk memutuskan perayu-perayu bertanggungan bagi jumlah yang dinyatakan dalam sijil secara kolateral. Tidak terdapat terma dalam pelantikan perayu-perayu sebagai peguamcara-peguamcara bahawa sebarang jumlah yang dinyatakan dalam sijil yang dikeluarkan akan turut menjadi hutang peguamcara tersebut.

(3) Selain daripada sijil, tiada apa-apa lain yang dikemukakan untuk menunjukkan apa yang dihutangi oleh Abdul Rashid. Tiada keterangan untuk menunjukkan bahawa walaupun bukti hutang telah difailkan oleh perayu-perayu pada masa material, Abdul Rashid akan berada dalam keadaan untuk membayar jumlah RM5,520,236.77 atau mana-mana bahagian dalamnya. Adalah tidak mungkin, malah tidak betul, untuk mahkamah membuat andaian berkenaan jumlah hutang yang boleh diperoleh daripada Abdul Rashid. Tidak diketahui berapa yang perayu-perayu boleh perolehi daripada Abdul Rashid bagi pihak responden sekiranya perayu-perayu tidak cuai dan telah memfailkan bukti hutang dengan teratur.

(4) Responden telah mengalami kerugian melalui kecuaian perayu-perayu kerana responden tidak dapat sebarang wang daripada Abdul Rashid. Walaupun mahkamah tidak dapat menerima dapatan hakim bicara bahawa responden telah mengalami kerugian sebanyak RM5,520,236.77 atau jumlah yang kurang, mahkamah hanya bersedia untuk mengawardkan sejumlah RM50,000 kepada responden sebagai ganti rugi nominal, yang dalam hal keadaan ini, tidak kecil mahupun melampau.

Case(s) referred to:

Beaumont v. Greathead [1846] 2 CB 494 ***(refd)***
Bonham-Carter v. Hyde Park Hotel Ltd (1948) 64 TLR 177 ***(refd)***
Cempaka Finance Bhd v. Ho Lai Ying & Anor [2006] 3 CLJ 544 FC ***(refd)***
Guan Soon Tin Mining Company v. Wong Fook Kum [1968] 1 LNS 43 FC ***(refd)***
Lee Sau Kong v. Leow Cheng Chiang [1960] 1 LNS 56 HC ***(refd)***
Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635 HC ***(refd)***
Sapwell v. Bass [1910] 2 KB 486 ***(refd)***
Syarikat Jengka Sdn Bhd v. Abdul Rashid Harun [1980] 1 LNS 125 FC ***(refd)***
Tahan Steel Corporation Sdn Bhd v. Bank Islam Malaysia Bhd [2012] 1 CLJ 959 CA ***(refd)***
Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd [1995] 1 CLJ 15 FC ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 74, 76
Evidence Act 1950, ss. 34, 73A(1)(a)(i), (ii), (b), (2), 90A

For the appellants - Ranjit Singh (CK Yeoh with him); M/s Ranjit Singh & Yeoh
For the respondent - M Menon (V Mugunthan with him); M/s Jaffar & Menon

[Appeal from High Court, Kuala Lumpur; Civil Suit No: 22 NCVC-886-07-2012]

Reported by Najib Tamby

JUDGMENT

Mah Weng Kwai JCA:

Brief Facts

[1] On or about 29 December 1995 the respondent appointed the appellants as their solicitors to commence civil proceedings against the borrower (Astral Master (M) Sdn Bhd) and three guarantors for the recovery of an outstanding sum of RM10,672,079.80.

[2] One of the guarantors was one Abdul Rashid bin Maidin ("Abdul Rashid").

[3] On 17 May 1996 the respondent entered into a consent order with Abdul Rashid and other defendants for the said sum of RM10,672,029.80 with interests and costs. The consent order was amended on 9 July 1996.

[4] As the debtors were in default of payment of the judgment sum, the respondent instructed the appellants to commence bankruptcy proceedings against Abdul Rashid and another guarantor.

[5] The appellants served the bankruptcy notice dated 24 May 2000 on Abdul Rashid on 23 November 2001.

[6] On 10 November 2004, Abdul Rashid challenged the validity of the bankruptcy notice but his application was dismissed by the Senior Assistant Registrar on 30 June 2006.

[7] On appeal to the judge in chambers, the learned judge allowed the appeal on 13 July 2007 on the ground that the bankruptcy notice was defective in that it contained the sum of RM669.75 as costs which were not provided for in the amended court order.

[8] On 30 July 2007 the respondent instructed the appellants to file an appeal to the Court of Appeal and at the same time to file a fresh bankruptcy notice against Abdul Rashid. The appellants filed the notice of appeal on 9 August 2007 but failed to file a fresh bankruptcy notice between 30 July 2007 and 15 November 2007.

[9] On 15 November 2007 the respondent discovered that Abdul Rashid had been adjudged a bankrupt on 4 October 2007.

[10] As the consent order was entered on 17 May 1996 the twelve year limitation period to enforce the judgment expired on 17 May 2008.

[11] Up till the expiry date of 17 May 2008, the appellants did not file a proof of debt with the official receiver on behalf of the respondent.

[12] On another bankruptcy search made on Abdul Rashid on 5 March 2009, that is after limitation had set in, it was discovered that Abdul Rashid was no longer a bankrupt.

[13] The appeal to the Court of Appeal filed on 9 August 2007 was withdrawn by the respondent on 15 October 2010.

[14] On 8 March 2012, the respondent issued a certificate of indebtedness stating that Abdul Rashid was indebted in the sum of RM5,520,236.77.

The Respondent's Pleaded Case

[15] The respondent's claim was premised on the implied terms of the appointment of the appellants that they would exercise reasonable skill and care in carrying out their duties as solicitors for the respondent. The respondent claimed that due to the negligence of the appellants in the conduct of the bankruptcy proceedings against Abdul Rashid they had lost the opportunity to recover any moneys due and owing from Abdul Rashid, pursuant to the amended consent order of 17 May 1996. The respondent in particular, complained that the appellants had failed to file the proof of debt within the time permitted or at all after Abdul Rashid had been adjudged a bankrupt on 4 October 2007 till limitation set in on 17 May 2008.

[16] The sum claimed by the respondent against the appellants was RM5,520,236.77 being the sum stated in the certificate of indebtedness issued by the respondent to Abdul Rashid.

The Defence

[17] The appellants of course denied all allegations of negligence in the conduct of the civil suit as well as the bankruptcy proceedings. Significantly, the appellants' defence and answer to the non-filing of the proof of debt was that the respondent had themselves failed to furnish the statements of accounts in respect of Abdul Rashid's account to enable the appellants to have filed the proof of debt.

Decision Of The High Court

[18] After a full trial the learned trial judge held the appellants 60% liable for negligence in their conduct of the respondent's affairs and the respondent 40% liable for contributory negligence when the respondent omitted/failed to furnish the statements of accounts to the appellants for the filing of the proof of debt.

[19] The learned trial judge ordered the appellants to pay the sum of RM3,312,142.06 being 60% of the sum of RM5,520,236.77 stated in the certificate of indebtedness, together with interests and costs.

[20] Being dissatisfied with the decision the appellants appealed against the whole of the decision and the respondent cross-appealed against that part of the order holding them 40% liable for contributory negligence.

Decision Of The Court Of Appeal

[21] Upon reading the rekod rayuan and the written submissions of counsel for the appellants and respondent and upon hearing the oral submissions of counsel aforesaid the court unanimously made the following orders:

(i) The cross-appeal by the respondent was allowed in that the appellants were held to be fully liable. The order of contributory negligence of 40% made by the learned trial judge against the respondent was set aside;

(ii) The appeal by the appellants was allowed in part in that while the appellants were found to be 100% negligent in the conduct of the case as solicitors, the order of damages in the sum of RM3,312,142.06 was set aside;

(iii) Nominal damages of RM50,000 was ordered to be paid by the appellants to the respondent; and

(iv) No order as to costs.

Application For Leave To Appeal To The Federal Court

[22] Being dissatisfied with part of the decision of the court, the respondent has applied for leave to appeal to the Federal Court.

[23] The appellants however, have not similarly applied for leave to appeal against that part of the decision which held the appellants 100% liable for negligence.

[24] Accordingly, the grounds of judgment in this case will only deal with the issue of dismissal of the claim for damages by the respondent.

[25] By not applying for leave to appeal against the finding on 100% liability, the appellants are presumed to be satisfied with that part of the decision.

Grounds Of Decision

[26] The court in allowing the appellants' appeal in part set aside the decision of the learned trial judge on damages on the ground that the respondent had failed to prove on a balance of probabilities, the quantum of damages claimed.

[27] In our judgment we are of the view that there was no admissible evidence adduced by the respondent to prove the sum of RM3,312,142.06 or any part thereof as damages suffered by the respondent. The respondent had merely relied on the certificate of indebtedness as the basis to prove the quantum claimed but as the maker of the document was not called as a witness and in the face of an objection by the appellants, the court ruled that the certificate of indebtedness was inadmissible in evidence.

[28] The court further held that even if the certificate of indebtedness was regarded as admissible in evidence, the certificate of indebtedness itself was insufficient to prove the measure of loss suffered by the respondent.

Inadmissibility Of The Certificate Of Indebtedness

[29] The admissibility of documentary evidence in civil cases is governed by s. 73A of the Evidence Act 1950.

[30] Pursuant to ss. 73A(1)(a)(i) and (b) of the Evidence Act 1950, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible in evidence of that fact if the maker of the statement had personal knowledge of the matters dealt with by the statement and if the maker of the statement is called as a witness in the proceedings.

[31] It was incumbent on the respondent therefore to have called Habsah binti Yasin, the maker of the certificate of indebtedness as a witness, unless of course the proviso to s. 73A(1) which reads:

> Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or unfit by reason of his bodily or mental condition to attend as a witness, or if he is beyond the seas and it is not reasonably practicable to secure his attendance, or if all reasonable efforts to find him have been made without success.

[32] The respondent had sought to admit the certificate of indebtedness as evidence by calling Ong Boon Yow ("PW1") to tender the document as an exhibit. But PW1 was not the maker of the certificate of indebtedness. Despite that fact and the objection raised by counsel for the appellants, the learned trial judge had nonetheless admitted the certificate of indebtedness as evidence and marked it as exh. P1.

[33] In our judgment we are of the view that the certificate of indebtedness, with respect, was wrongly admitted into evidence. There was no evidence to suggest that "the maker of the certificate of indebtedness was either dead, or unfit by reason of his bodily or mental condition to attend as a witness or was beyond the seas" to come within the ambit of the proviso to s. 73A(1). In fact no evidence was led as to the identity of the person who had actually issued and signed the certificate of indebtedness dated 8 March 2012, let alone to explain to the court why that person was not called as a witness and that it was sought to admit the certificate of indebtedness through the evidence of PW1.

[34] As the certificate of indebtedness was erroneously admitted as an exhibit, it ought to be expunged from the record. In *Syarikat Jengka Sdn Bhd v. Abdul Rashid Harun* [1980] 1 LNS 125; [1981] 1 MLJ 201, it was held that a document which is inadmissible as evidence because the maker was not called as a witness shall remain inadmissible and be disregarded in its entirety.

[35] It is significant to note that for some untold reason the respondent did not at any time attempt to rely on the provisions of s. 73A(2), which provides:

> (2) In any civil proceedings, the court may at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in subsection (1) shall be admissible as evidence or may, without any such order having been made, admit such a statement in evidence:

A (a) notwithstanding that the maker of the statement is available but is not called as a witness; and

(b) notwithstanding that the original document is not produced, if, *in lieu* thereof, there is produced a copy of the original document or of the material part thereof
B certified to be a true copy in such manner as may be specified in the order or as the court may approve, as the case may be.

if indeed the respondent was in such a position. For the learned
C trial judge to act under s. 73A(2) it would have been imperative for the respondent to move the court to do so.

[36] Further, it will be noted that for some unexplained reason the respondent did not alternatively attempt to admit the certificate of indebtedness into evidence as a document pursuant to the
D provisions of s. 90A of the Evidence Act 1950, if indeed the document was produced by a computer. If the background facts had been laid by the respondent, arguments on admissibility under s. 90A would have been enlightening.

E **[37]** In conclusion on the point of admissibility under s. 73A(1)(a), the court is of the view that the respondent would not be able to tender the certificate of indebtedness as evidence through PW1 under s. 73A(1)(a)(ii) as PW1 was not the maker of the statement.

F

Certificate Of Indebtedness Not Conclusive Evidence Of Indebtedness Against The Appellants

[38] In the event the court is wrong to exclude the certificate of indebtedness as evidence from the record, we wish to address the
G following points below:

(i) The principle on the effect of a certificate of indebtedness has been well established by the oft-cited decision of the Federal Court in the case of *Cempaka Finance Bhd v. Ho Lai*
H *Ying & Anor* [2006] 3 CLJ 544, which stated that a certificate of indebtedness is conclusive evidence of indebtedness by the borrower of the sum stated therein. In *Cempaka Finance Bhd* it was also held that the certificate of indebtedness excused the plaintiff from adducing the proof of
I debt and shifting the burden onto the defendant to disprove the amount claimed;

(ii) However, before the certificate of indebtedness can become operable and binding, there must firstly be in existence a "conclusive evidence clause" in the agreement between the lender and the borrower;

(iii) In the present case there was no such clause in the express and/or implied terms of retainer of the appellants as solicitors. In any event the certificate of indebtedness was issued by the respondent for purposes of the loan agreement between the respondent as the lender bank and Astral Master (M) Sdn Bhd as the borrower and not for purposes of the retainer agreement between the respondent and the appellants. The respondent cannot merely rely on the certificate of indebtedness to hold the appellants liable for the amount stated in the certificate of indebtedness collaterally. It simply was not a term of the appointment of the appellants as solicitors that any sum stated in the certificate of indebtedness issued would also become the debt of the solicitors;

(iv) Further and in any event, there was no evidence proven to show that there was a conclusive evidence clause in the letters of guarantee executed by Abdul Rashid. And if there was no such clause, then the certificate of indebtedness, even if admissible, would not be conclusive evidence of the amount owing by Abdul Rashid as a guarantor;

(v) We are of the view that if the certificate of indebtedness was admissible in evidence, it would have, notwithstanding the provisions of s. 34 of the Evidence Act 1950, and contrary to the submission of counsel for the appellants, been able to show the amount owing by Abdul Rashid if indeed, there was a conclusive evidence clause in the agreement between Abdul Rashid and the respondent. (See *Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd* [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635; [1989] 3 MLJ 360 and s. 34 Evidence Act 1950);

(vi) In her grounds of judgment, the learned trial judge allowed the certificate of indebtedness to be admitted since "the certificate was issued under the plaintiff's letterhead and tendered through PW1, Ong Boon Yow, who is the head of large and medium loans, in special assets management,

A and therefore the superior of Habsah" notwithstanding the objection of counsel for the appellants that the certificate of indebtedness was not admissible since the maker was not called to court to tender it. However, we are unable to agree with the learned trial judge and accept the reason
B given for the admission of the certificate of indebtedness. Under s. 73A of the Evidence Act 1950 it mattered not whether the certificate of indebtedness was issued under the respondent's letterhead and tendered through the superior officer of the maker of the certificate of
C indebtedness as there is no provision for such admissibility under s. 73A.

(vii) Apart from the certificate of indebtedness as the purported evidence, there was nothing else adduced to show what
D was in fact owing by Abdul Rashid. It must be remembered that Abdul Rashid was adjudged a bankrupt on 4 October 2007 and thus deemed insolvent in law. There was no evidence to show, even if the proof of debt had been filed by the appellants at the material time, that Abdul Rashid
E would have been in a position to pay the sum of RM5,520,236.77 or any part thereof. It was simply not possible, indeed not correct, for the court to speculate how much of the debt was recoverable from Abdul Rashid. The respondent by claiming the sum against the appellants was
F taking the simplistic view that as Abdul Rashid was indebted for the full sum as per the certificate of indebtedness then the appellants would therefore be similarly indebted to the respondent. As submitted by counsel for the appellants, no witness was called from the
G insolvency department to testify as to the state of the financial affairs and standing of Abdul Rashid; of how many creditors in all had filed their proofs of debt and how much in the dollar each creditor could be expected to recover from the estate of Abdul Rashid, if at all. There was simply
H no telling how much the appellants could have recovered from Abdul Rashid on behalf of the respondent if the appellants were not negligent and had filed the proof of debt accordingly. Even PW1 was unable to say anything positive on the chances of recovery from Abdul Rashid.

I

(viii) For the respondent to succeed in their claim against the appellants, they had the burden of proving both the fact and the amount of damages that could be recovered. The certificate of indebtedness, even if admissible, would have been insufficient, for reasons discussed above, for the respondent to prove the quantum of damages suffered by them as a result of the negligence of the appellants.

(x) It is trite that for the respondent to be able to claim for damages against the appellants, the respondent must prove their damages. (See ss. 74 and 76 of the Contracts Act 1950). The way the respondent had gone about to prove their claim against the appellants fell far short of what was enunciated by Lord Goddard in *Bonham-Carter v. Hyde Park Hotel Ltd* (1948) 64 TLR 177 where His Lordship said:

> Plaintiffs must understand that if they bring actions for damages it is for them to prove their damages; it is not enough to write down the particulars, and so to speak, throw them at the head of the Court, saying: 'This is what I have lost; I ask you to give me these damages.' They have to prove it.

(xi) Those illuminating words were spoken by Lord Goddard way back in 1948 and not surprisingly they still ring true till today. (See also *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd* [1995] 1 CLJ 15; [1994] 3 MLJ 777 and *Lee Sau Kong v. Leow Cheng Chiang* [1960] 1 LNS 56; [1961] 1 MLJ 17)

(xii) On the burden of proving both the fact and the amount of damages Ong Hock Thye FJ (as he then was) in *Guan Soon Tin Mining Company v. Wong Fook Kum* [1968] 1 LNS 43; [1969] 1 MLJ 99 spoke of the burden of proof in this way:

> The respondent, as plaintiff, of course had to discharge the burden of proving both the fact and the amount of damages before he could recover. Where he succeeded in proving neither fact nor amount of damages he must lose the action or, if a right was infringed, he would recover only nominal damages. Where he succeeded in proving the fact of damage, but not its amount, he would again be entitled to an award of nominal damages only. This statement of the law is concisely stated in *Mayne & McGregor on Damages* (12th Edn) para 174.

(xiii) Further, we are of the view that as the certificate of indebtedness was not admissible in evidence there was no burden on the appellants to lead any evidence to prove that the amount owing as stated in the certificate of indebtedness was erroneous. The learned trial judge was thus in error when holding that "the amount as stated in exh. P1 can be accepted by the court as conclusive proof of what is currently owing by Abdul Rashid to the plaintiff".

Nominal Damages

[39] Although it was the finding of this court that the respondent had failed to prove the damages suffered by way of the certificate of indebtedness, the court nonetheless recognised the fact that the respondent must have suffered some amount of loss through the negligence of the appellants as the respondent was wholly unable to recover any sums of money from Abdul Rashid.

[40] In the circumstances, while the court could not accept the finding of the learned trial judge that the respondent had lost the sum of RM5,520,236.77 (or RM3,312,142.06 being 60% of the total sum) or any lesser sum, the court was only prepared to award the sum of RM50,000 to the respondent as nominal damages. This sum was awarded notwithstanding the submission of counsel for the respondent that a sum of RM500,000 should be awarded as nominal damages.

[41] In *Beaumont v. Greathead* [1846] 2 CB 494 at p. 499, Maule J described nominal damages as "a sum of money that may be spoken of, but that has no existence in point of quantity". Often nominal damages are referred to as a token sum awarded where the amount could be small or miniscule (see *Sapwell v. Bass* [1910] 2 KB 486.

[42] In the case before us, we are of the view that the sum of RM50,000 awarded as nominal damages as opposed to substantial damages, is neither miniscule nor excessive in the circumstances. The sum is reasonable given that there was insufficient evidence adduced by the respondent to prove damages. Taking the case as a whole we are of the view that it was difficult if not impossible, to assess the damages in the context of the evidence adduce or the lack thereof. (See *Tahan Steel Corporation Sdn Bhd v. Bank Islam Malaysia Bhd* [2012] 1 CLJ 959; [2012] 2 MLJ 314 CA).

Conclusion

[43] In the result, the court unanimously held that while the respondent had succeeded in proving liability on a 100% basis against the appellants, the respondent had failed to prove the quantum of damages suffered due to the negligence of the appellants.

[44] Accordingly the appellants' appeal was allowed only in part while the respondent's cross-appeal was allowed.

[45] The respondent was awarded nominal damages of RM50,000.

[46] No order as to costs was made to either party.